

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets : Case No. 2012-0187
: :
: Appeal from the Public Utilities
: Commission of Ohio
: :
: Public Utilities Commission of Ohio Case
: Nos. 08-917-EL-SSO and 08-918-EL-SSO

In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan :
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REPLY BRIEF OF
APPELLANT INDUSTRIAL ENERGY USERS-OHIO

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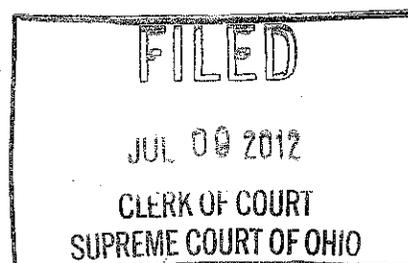
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**REPLY BRIEF OF
APPELLANT INDUSTRIAL ENERGY USERS-OHIO**

INTRODUCTION

By remanding this proceeding to the Public Utilities Commission of Ohio (“Commission”),¹ this Court provided the Commission an opportunity to correct errors the Commission committed when it authorized Columbus Southern Power Company (“CSP”) and Ohio Power Company (“OP”) (collectively, “Companies”) to raise rates to levels not permitted under Ohio law or based on the record. Although the Commission has claimed that it acted on that direction,² the Commission illegally and unreasonably authorized the Companies to collect revenue for a carrying cost of 2001-2008 incremental environmental investments (“Pre-2009 Component”) under Section 4928.143(B)(2), Revised Code. Additionally, the Commission failed to flow-through the effects of a proper determination that the Pre-2009 Component and the Provider of Last Resort (“POLR”) charge were illegal and unreasonable. Unless this Court reverses the Commission’s Order on Remand, the Companies will illegally and unreasonably collect hundreds of millions of dollars in illegally authorized revenue plus interest over seven years.

PROPOSITION OF LAW NO. I

The Commission’s finding that the Companies may collect revenues for the carrying costs of 2001-2008 incremental environmental investments (Pre-2009 Component) pursuant to Section 4928.143(B)(2)(d), Revised Code, is unlawful and unreasonable because the Companies failed to demonstrate that granting such collection would have the effect of providing certainty regarding retail electric service.

PROPOSITION OF LAW NO. II

¹ *In re Columbus Southern Power Co.*, 128 Ohio St. 3d 512 (2011) (“*Remand Decision*”).

² Merit Brief Submitted on Behalf of Appellee, The Public Utilities Commission of Ohio at 1 (May 29, 2012) (“*Commission Brief*”).

The Commission's finding that the Companies may collect revenues for the Pre-2009 Component pursuant to Section 4928.143(B)(2)(d), Revised Code, is unlawful and unreasonable because the Companies failed to demonstrate that their other revenues did not provide adequate compensation.

PROPOSITION OF LAW NO. III

The Commission's authorization of the Pre-2009 Component pursuant to Section 4928.143(B)(1), Revised Code, was unlawful and unreasonable in that it is based on a statutory provision that was not advanced by any party to the proceeding and was beyond the scope of the Court's remand directing the Commission to determine if a provision of Section 4928.143(B)(2), Revised Code, supports collection of these revenues.

In approving compensation for the Pre-2009 Component in 2009, the Commission failed to provide any statutory basis for its decision.³ After the Court reversed the Commission's order, the Commission offered the Companies an opportunity to demonstrate the basis on which they should be authorized to collect compensation for the Pre-2009 Component.⁴ Based on the Court's determination that the Commission had failed to provide a statutory basis for its initial Opinion and Order authorizing the Pre-2009 Component, the Companies attempted to justify the collection of the charges on multiple theories.⁵ The Commission rejected all but one, that the Pre-2009 Component may be authorized under Section 4928.143(B)(2)(d), Revised Code. According to the Commission, the provision is satisfied by showing "[c]ustomers benefit from

³ *Remand Decision*, 128 Ohio St.3d at 519-20.

⁴ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-El-SSO, *et al.*, Entry at 4 (May 25, 2011) (IEU-Ohio App. at 156).

⁵ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-El-SSO, *et al.*, Order on Remand at 11-12 (Oct. 3, 2011) (IEU-Ohio App. at 169-70).

the lower cost power that they receive as a result” of the Companies’ investments to comply with environmental requirements.⁶ The testimony the Commission relied upon, however, does not support a finding that the Pre-2009 Component has the effect of making retail electric service more reliable. In authorizing collection of the Pre-2009 Component, the Commission also ignored its own precedent requiring an economic justification to support a rate increase. The Commission also attempted to buttress its Order on Remand by reliance on a statutory provision outside the law of the case.⁷ Because neither the law nor the record supports the Appellees’ positions, the Court should reverse and remand the Commission’s finding that the Pre-2009 Component was legally authorized under Section 4928.143(B)(2)(d), Revised Code.

In their attempt to justify the continuation of the Pre-2009 Component, the Commission and the Companies misconstrue and misapply Section 4928.143(B)(2)(d), Revised Code. In response to Industrial Energy Users-Ohio’s (“IEU-Ohio”) demonstration that the Commission failed to properly apply the statute when it approved the Pre-2009 Component in the Remand Opinion, the Commission and the Companies argue that Section 4928.143(B)(2)(d), Revised Code, does not require that there be a showing that the charge is “necessary” to the provision of retail electric service.⁸ Because the division requires that the “carrying charge” must “have the effect of ... providing certainty regarding retail electric service,” the Commission’s and the Companies’ suggestion that such a showing is not “necessary” misreads both the statute and the

⁶ Commission Brief at 7 (quoting Remand Opinion at 14); Merit Brief of Intervening Appellee, Ohio Power Company at 4 (May 30, 2012) (“Companies Brief”) (same).

⁷ Order on Remand at 15 (IEU-Ohio App. at 173).

⁸ Commission Brief at 5; Companies Brief at 5.

burden placed on the Companies to justify the recovery of the Pre-2009 Component.⁹ The statutory provision, by its terms, requires an EDU to demonstrate that the requested item, in this case the Pre-2009 Component, will have the effect of making retail electric service more certain.

Additionally, the Commission and the Companies argue that the record supports a finding that the Pre-2009 Component can be properly authorized under Section 4928.143(B)(2)(d), Revised Code. In support of this argument, the Commission and the Companies again rely on the testimony of a witness for the Companies, Phillip Nelson, who testified in the 2008 ESP hearing that the environmental investments on which the Pre-2009 Component was based had the effect of lowering fuel costs when compared to a purchased power alternative.¹⁰ Mr. Nelson's testimony plainly did not address the relevant question of whether the carrying charges would have the effect of making retail electric service more certain. There is no basis for granting deference to testimony that did not address the issue presented by the statute.¹¹ Since that is the only "fact" on which Commission makes its finding to justify the Pre-2009 Component, the Commission has once again approved a rate increase without a supporting record.¹²

⁹ In an electric security plan ("ESP") case, the electric distribution utility ("EDU") has the burden to demonstrate that the ESP is more favorable in the aggregate than a plan that could be approved under Section 4928.142, Revised Code, a market rate offer ("MRO"). Section 4928.143(C)(1), Revised Code.

¹⁰ Commission Brief at 7-8; Companies Brief at 5-6

¹¹ Companies Brief at 7.

¹² The Court in this case previously found that the Commission had approved a POLR charge on findings that were against the manifest weight of the evidence. *Remand Decision*, 128 Ohio St. at 520.

Further, the Companies did not provide a justification that any additional revenue was necessary above and beyond the compensation without the Pre-2009 Component. It is not enough to suggest that the Pre-2009 Component represented assets that were not previously included in rates.¹³ Since generation rates are not based on cost, the Commission has required an economic justification for riders.¹⁴ When the Commission addressed the Pre-2009 Component, however, it failed to apply the same standard.¹⁵ In response to IEU-Ohio's demonstration that the Commission has taken inconsistent positions, the Commission's response is that the statute does not require such a justification and that the prior decision requiring some economic justification before permitting a rate increase was decided under Section 4928.143(B)(2)(h), Revised Code.¹⁶ In fact, neither Section 4928.143(B)(2)(d) or (h), Revised Code, explicitly states that there must be an economic justification, but this Court's precedent concerning the Commission's need to abide by its own determinations requires the Commission to apply consistent interpretations or explain why it has not followed its prior precedent.¹⁷

Finally, there was no evidence to contradict the testimony that the Companies' generation plants are not required to assure retail electric service. The only evidence in the record addressing the actual dispatch of power contradicted the conclusion reached by the Commission that the Pre-2009 Component had the effect of providing certainty. As IEU-Ohio's witness

¹³ Companies Brief at 8.

¹⁴ IEU-Ohio Brief at 16-18.

¹⁵ *Id.* at 16-19.

¹⁶ Commission Brief at 9-10. The other section referred to is Section 4928.143(B)(2)(h), Revised Code.

¹⁷ *Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n of Ohio*, 42 Ohio St.2d 403, 431 (1975) ("*Cleveland Electric*").

Kevin Murray stated, under the PJM Interconnection, LLC (“PJM”) system, PJM controls and dispatches generating plants to meet customers’ needs without regard to ownership.¹⁸ As a result, the Commission’s authorization of the Pre-2009 Component under Section 4928.143(B)(2)(d), Revised Code, was against the manifest weight of the evidence.

The Commission, however, compounded the error by making an additional finding that the Pre-2009 Component could be justified under Section 4928.143(B)(1), Revised Code, as a provision “relating to the supply and pricing of electric generation service.”¹⁹ This additional finding was outside the law of the case and is ground for reversal.²⁰

The Commission and the Companies offer several nonsensical arguments urging the Court to ignore this violation. Initially, the Commission offers an argument that applies to a separate rider the Commission approved for environmental investments the Companies made after 2008 that is not at issue in this appeal.²¹ Alternatively, the Companies propose that the Commission should be allowed to “think for itself.”²² Given that the Commission itself stated that it understood and followed the directions of the Court,²³ the Companies’ assertion that the Commission should ignore the terms of the *Remand Decision* is one that is not supported by the Commission or a legal argument. Additionally, the Companies argue that the Court did not make a binding determination in its *Remand Decision* that would limit the Commission’s

¹⁸ IEU-Ohio Remand Ex. 2 at 6 (IEU-Ohio Supp. at 58).

¹⁹ Order on Remand at 15 (IEU-Ohio App. at 173).

²⁰ *Nolan v. Nolan*, 11 Ohio St.3d 1, 5 (1984).

²¹ Commission Brief at 11.

²² Companies Brief at 10.

²³ *Id.* at 1.

review.²⁴ The issue the Court remanded, however, was specifically limited to whether Section 4928.143(B)(2), Revised Code, authorized the Pre-2009 Component.²⁵

The Commission further argues that the law of the case does not govern its proceedings because it is acting in a legislative function when it is deciding the terms of an ESP.²⁶ This assertion plainly contradicts the Commission's opening statement that it understood and followed the Court's orders in the *Remand Decision* and contradicts the express legislative direction in the Revised Code. The Revised Code provides this Court with sole jurisdiction over orders of the Commission²⁷ and requires the Court "to reverse, vacate, or modify a final order of the public utilities commission ... if, upon consideration of the record such court is of the opinion that such order was unlawful or unreasonable." The Commission's suggestion that it is relieved of an obligation to follow the direction contained in the Court's decision violates the supremacy of the Court over the decisions of the Commission that is not based on a proper reading of the applicable law.

The Companies further argue that the Court should ignore the violation of the law of the case because there has been no showing of prejudice since the Commission approved the Pre-2009 Component based on Section 4928.143(B)(2)(d), Revised Code.²⁸ As discussed previously, however, the Commission unlawfully authorized the Pre-2009 Component based on Section 4928.143(B)(2)(d), Revised Code. Because the authorization of the Pre-2009

²⁴ *Id.* at 11-12.

²⁵ *Remand Decision*, 128 Ohio St.3d at 520.

²⁶ Commission Brief at 13.

²⁷ Section 4903.12, Revised Code.

²⁸ Companies Brief at 11.

Component is unlawful under Section 4928.143(B)(2)(d), Revised Code, the Commission's attempt to buttress its decision by reliance on Section 4928.143(B)(1), Revised Code, is prejudicial as it remains the only basis for maintaining the illegal carrying cost.

PROPOSITION OF LAW NO. IV

The Commission unlawfully and unreasonably permitted a rate increase and collection of the Pre-2009 Component during a period in which there was no legal authority to permit collection of the Pre-2009 Component.

Following the Court's *Remand Decision*, the Commission was aware that it had not properly authorized the Pre-2009 Component. In its May 4, 2009 Entry, the Commission directed the Companies to remove the Pre-2009 Component from its rates. The Companies objected, and the Commission permitted the continued collection subject to refund in the May 25, 2011 Entry. At no time between May 25, 2011 and the Commission's Remand Order, however, was there a finding that the Pre-2009 Component was legally authorized. As a result, the Commission's decision to permit the Companies to retain the amount collected subject to refund was not based on any legal authorization. Because the collection was not legally authorized, the Commission should have directed the Companies to refund the amounts that were collected subject to refund.

The Commission and the Companies respond that such a refund would violate this Court's decision in the *Cleveland Electric* case.²⁹ That case holds that rates do not automatically revert to the previously authorized rates when the Court reverses the Commission; it takes a subsequent order by the Commission on remand to establish new rates.

²⁹ The Companies assert that the Appellant failed to apprise the Court of relevant legal authority. *Id.* at 13-14. As discussed below, the *Cleveland Electric* case does not apply to the facts of this case and, therefore, is not relevant legal authority.

The *Cleveland Electric* decision is distinguishable from this case. Unlike the proceeding in the *Cleveland Electric* case, the Commission issued an Entry finding that the challenged rates were unauthorized on May 4, 2011 and ordered the Companies to file new tariffs removing the amounts the Court had found were not authorized. When the Companies objected, the Commission did not make a finding that the Pre-2009 Component was authorized; instead it allowed collection subject to refund and required the Companies to file new tariffs with that limitation on collection effective June 1, 2011. After the Commission permitted collection subject to refund, the Commission did not find that there was legal authority to collect the Pre-2009 Component until its October 3, 2011 Remand Order. Thus, for the period beginning from at least May 25, 2011, to October 3, 2011, the Companies did not have any legal authority to collect and keep the Pre-2009 Component.

Neither of the Appellees argues that the Pre-2009 Component was properly authorized after the Court issued its decision on April 19, 2011. Instead, the Commission would have the Court extend the *Cleveland Electric* case to this matter as if the Commission had not determined that there was no legal authority for the continuation of the Pre-2009 Component. As noted above, that decision is not applicable. Similarly, the Companies argue that the *Cleveland Electric* decision controls (it does not),³⁰ that it should not be overturned (IEU-Ohio has not argued that it should be),³¹ and that extending the *Cleveland Electric* case to the facts of this case “is a more workable alternative in that it fosters stability and predictability, until the Commission has adequate time to thoughtfully consider issues on remand.”³² The crux of the Companies’

³⁰ *Id.* at 12-14.

³¹ *Id.* at 14-15.

³² *Id.* at 15.

argument, thus, is that it should be permitted to collect rates that the Commission on May 4, 2011 determined were being unlawfully collected until such time as the Commission resolves the remanded issue. Nothing in the *Cleveland Electric* case, the ESP statute which permits the Companies to collect only those charges properly within the terms of Section 4928.143(B), Revised Code, or some self-serving policy argument that customers should be unlawfully charged for some indeterminate period after the Commission has explicitly found that the Pre-2009 Component was not authorized, can justify the Companies' misguided argument.

PROPOSITION OF LAW NO. V

The Commission's Order on Remand is unlawful and unreasonable because it failed to order the adjustment of the phase-in deferral balance of the Companies on the theory that the proposed adjustment "would be tantamount to unlawful retroactive ratemaking."

PROPOSITION OF LAW NO. VI

The Commission's Order on Remand is unlawful and unreasonable because it failed to order the adjustment of the phase-in deferral balance of the Companies based on a finding not supported in the record that the "past rates ... have already been collected from customers."

PROPOSITION OF LAW NO. VII

The Commission's Order on Remand is unlawful and unreasonable in that it extended the prohibition of retroactive ratemaking to prevent the adjustment of the phase-in deferral balance subject to collection in the future and which were subject to further adjustment by the Commission's order establishing the basis for such deferral balance.

PROPOSITION OF LAW NO. VIII

The Commission's Order on Remand is unlawful and unreasonable in that it failed to address the flow-through effects of the Court's finding of the

Commission's original Opinion and Order on the deferral balance, recovery of delta revenues, and the earnings of the Companies.³³

As discussed in IEU-Ohio's initial brief, the Commission ordered the Companies to phase-in any authorized rate increases so as not to exceed, on a total bill basis, certain percentage increases for each of the three years of the ESP.³⁴ "Any amount over the allowable total bill increase percentage levels [would] be deferred pursuant to Section 4928.144, Revised Code, with carrying costs."³⁵ Any deferred balance at the end of 2011 was to be recovered by a nonavoidable surcharge.³⁶

The amount to be collected through the phase-in rates was not and could not be known at the time the Commission decided the ESP case in 2009. Before the Companies collected any of the deferral balance, the proper amount to be collected had to be determined, and on two occasions already, the Commission reduced the deferral balance based on its determination that the authorized ESP rates produced significantly excessive earnings and due to a finding that the Companies had overstated fuel expenses due to the improper booking of the benefits of a fuel contract modification. Despite this Court's finding that the POLR charge and Pre-2009 Component were improperly authorized and the Commission's own finding that the Companies

³³ The Staff offers that there is no basis for addressing the issues raised by IEU-Ohio, relying on the same arguments it advances in support of its position on Propositions of Law IV to VII. IEU-Ohio relies on its first brief to support Proposition of Law VIII and does not repeat those arguments in this Brief.

³⁴ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-El-SSO, *et al.*, Opinion and Order at 40 (Mar. 18, 2009) at 22 (Appx. at 92).

³⁵ *Id.* This amount is referred to as the "phase-in deferral" amount and the phase-in authorized by the Commission was pursuant to Section 4928.144, Revised Code.

³⁶ *Id.* at 22-23 (Appx. At 92-93).

had failed to establish a legal basis to recover the POLR charge, the Commission nonetheless refused to address the effects of these findings on the deferral balance (the portion of the rate increase to be collected in the future). Although the Commission and the Companies argue that any revision of the deferral balance would constitute retroactive ratemaking and a collateral attack on the 2009 Opinion and Order, they misstate the facts and misapply law applicable to the rate increases that are delayed for future collection.

To avoid addressing the restatement of the delayed portion of the increase, the Commission and the Companies recast the delayed portion into something it is not. The Commission argues that any order restating the delayed portion would “claw back the POLR amounts that were charged to customers before this Court’s earlier decision reversing the Commission’s order that established the AEP-Ohio ESP.”³⁷ The Companies argue that the POLR amounts were lawfully “collected” and, therefore, cannot be “refunded” to customers.³⁸ Each then states that the prohibition of retroactive ratemaking prevents the proper restatement of the delayed portion.³⁹ Thus, both of these arguments are based on the same fundamental error contained in the Order on Remand that an adjustment to the delayed portion of the increase “would be tantamount to unlawful retroactive ratemaking”⁴⁰ and the Entry on Rehearing that the POLR charges had already been collected from customers.⁴¹

³⁷ Commission Brief at 18.

³⁸ Companies Brief at 17.

³⁹ Commission Brief at 19-22; Companies Brief at 24-25.

⁴⁰ Order on Remand at 35-36 (IEU-Ohio Appx. at 193-94).

⁴¹ Entry on Rehearing at 18 (IEU-Ohio Appx. at 256).

The delayed portion of the increase, however, is the difference between the revenue collected during the ESP period subject to the bill increase limitations and the revenue increases that would have otherwise occurred without such limitations. The delayed or to-be-phased-in portion of the increase was overstated because the total increase includes an allowance for revenues which cannot be lawfully recognized for purposes of establishing rates and charges. In other words, but for the illegally authorized charges included in the Commission's specification of the total increase, the amount of the delayed or to-be-phased-in portion of the increase would have been less as a matter of mathematical certainty.

The Commission argues that the EDU is entitled to recover the deferral without any adjustment for POLR charges unlawfully authorized.⁴² Yet, the Commission in two instances has recognized that it is authorized to adjust the delayed or to-be-phased-in portion of the increase to properly restate the amount to be prospectively collected from the Companies' customers. When the Commission determined that authorized rates resulted in significantly excessive earnings in 2009, the Commission directed that the amount of the delayed portion of the increase for CSP's rates be reduced to zero.⁴³ When the Commission determined that OP illegally collected too much ESP revenue in 2009 for fuel, it ordered that the to-be-phased-in portion of the increase be reduced by the amount OP illegally collected.⁴⁴ These Commission

⁴² Commission Brief at 18 and 23.

⁴³ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10*, Case No. 10-1261-EL-UNC, Opinion and Order (Jan. 11, 2011) (IEU-Ohio Appx. at 341).

⁴⁴ *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, *et al.*, Opinion and Order, (Jan. 23, 2012) (IEU-Ohio Appx. at 356).

decisions adjusting the to-be-phased-in portion of the ESP increase to reflect illegally excessive revenue collections in 2009 are consistent with the Commission's initial determination that the to-be-phased-in amounts would be limited to only the "allowable total bill increase percentage levels."⁴⁵ Removing the illegal portion of the total revenue increase that is consequentially embedded in the to-be-phased-in portion of the total increase is exactly what the Commission itself has done to comply with the law.

The Commission also argues that the statute mandates the recovery of the amounts that were delayed for future recovery by the EDU.⁴⁶ Section 4928.144, Revised Code, however, does not give any indication that the General Assembly intended that authorization of phase-in results in a permanent bar to adjusting the amount of the phase-in to remove the illegal portion of the total increase embedded in the amount that is ultimately eligible for collection from customers. To the contrary, this Court and the Commission have long recognized that the authorization of deferral accounting does not constitute ratemaking and have consistently found that accounting deferrals are subject to further review and adjustment to reconcile the accounting with the amount legally and reasonably eligible for collection from customers.⁴⁷ As the Commission acknowledges, "[d]eferrals ... are subject to later determinations as to whether the deferred amounts are proper for recovery at all."⁴⁸

⁴⁵ Opinion and Order at 22 (IEU-Ohio App. at 92).

⁴⁶ Commission Brief at 25.

⁴⁷ IEU-Ohio Brief at 36 (discussion and citations concerning the treatment of deferrals and the application of the retroactive ratemaking prohibition).

⁴⁸ Commission Brief at 18.

Instead, the Commission argues that Section 4928.144, Revised Code, creates “special deferrals.”⁴⁹ The remainder of its argument on this point, however, makes clear that all the Commission is saying is that the POLR charges and Pre-2009 Component were collected from customers and that the delayed amount of the total increase is related to fuel expenses.⁵⁰ Thus, the “special deferral” is nothing more than a continuation of the incorrect assertion that the illegal amounts had already been collected from customers. What is inescapable is that the to-be-phased-in portion of the total increase is an amount that has not been collected from customers and it is currently overstated as a result of the Commission’s failure to remove the effects of the illegal amounts embedded in the portion of the total increase delayed for future collection.

The suggestion that the deferral created by Section 4928.144, Revised Code, is “special,” moreover, is not supported by that section. According to the Commission, Section 4928.144, Revised Code, is “highly prescriptive” and results in a determination that “[t]he utility is entitled to this money”.⁵¹ The section, however, requires the Commission to determine that the phase-in is “just and reasonable.” It would be neither “just” nor “reasonable” for the Commission to authorize the collection of the deferral without a restatement to remove the excessive amounts embedded in the deferral due to the illegally authorized rates. The Commission’s legal argument effectively walls off a remedy to consumers so long as the consequence of the Commission’s illegal action is deferred for future collection through Section 4928.144, Revised Code. The

⁴⁹ *Id.*

⁵⁰ *Id.* at 18-19.

⁵¹ *Id.* at 25.

Commission strains too much to deprive consumers of any remedy for the Commission's illegal actions.

The Commission also attempts to avoid addressing the Appellant's point of law by resorting to a prohibition on retroactive ratemaking, offering that "[a]ppellants seek restitution."⁵² In support of the assertion that appellants are seeking restitution, the Commission continues that Appellants "believe that customers were improperly charged rates prior to the Court's earlier order."⁵³ The Commission, however, misconstrues the legal issue presented by the appeal: the issue in this case is not what customers *were charged*. *Instead, the issue is whether the effect of the illegal charges on the total revenue increase can and must be removed from the portion of that total increase that is eligible for collection from consumers in the future.*

Once the issue is correctly framed, it is apparent that the Commission improperly relied on the prohibition on retroactive ratemaking. Customers are not seeking restitution, as asserted by the Commission. They seek to avoid being charged for amounts that are not properly eligible for inclusion in future rates.

The Companies also seek to invoke retroactive ratemaking, but claim that the 2009 Opinion and Order "was a ratemaking order, not merely an accounting order."⁵⁴ By jumping to the conclusion that the order setting up deferral accounting was a ratemaking order, the Companies then argue that any adjustment to the to-be-phased-in portion of the total increase would result in retroactive ratemaking.⁵⁵ The characterization of the Commission's 2009

⁵² *Id.* at 21.

⁵³ *Id.*

⁵⁴ Companies Brief at 22-23.

⁵⁵ *Id.* at 23.

deferrals and make “authority to securitize” deferrals less “meaningful.”⁵⁷ Any uncertainty, however, was inherent in the Commission’s authorization of the use of deferred accounting. Based on the terms of the 2009 Opinion and Order, the requirement that the recovery mechanism be just and reasonable, and the precedent establishing that an order approving the use of deferred accounting is not a ratemaking order, the amounts subject to recovery were always subject to Commission review. Moreover, the General Assembly itself has recognized that amounts deferred for future collection cannot be securitized until the lawful amount eligible for securitization is finally determined, an explicit recognition that the process for securitization is dependent on determining the proper amount recoverable from customers.⁵⁸ The Companies’ argument that the reversal of the Commission’s order will adversely affect future ratemaking and securitization, therefore, ignores the facts and the law governing these issues.

Finally, the Companies argue that recognition of flow-through effects on the to-be-phased-in portion of the total increase constitutes a collateral attack of the 2009 Opinion and Order establishing the phase-in mechanism.⁵⁹ In support of this argument, the Companies state that no party appealed the “reasonableness of the FAC cost deferral itself.”⁶⁰ The fact that no party appealed approval of deferred accounting, however, does not mean that the illegal portion of the total increase embedded in the deferred accounting are out of the law’s reach. “The objective of a collateral attack is to modify a previous judgment because it is allegedly

⁵⁷ Companies Brief at 23.

⁵⁸ Section 4928.23(J), Revised Code (phase-in costs defined as those authorized by the Commission pursuant to a final order for which appeals have been exhausted).

⁵⁹ Companies Brief at 25.

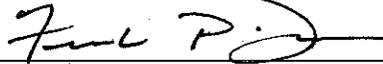
⁶⁰ *Id.*

deprive injured parties of a meaningful remedy though the form of accounting approved by the Commission.

It is perplexing that the Commission strains so in this appeal to transform the appellate process into a process that is incapable of yielding anything more than a hollow victory. The Commission itself has prospectively adjusted downward the to-be-phased-in portion of the total increase to reflect amounts illegally collected in 2009. But, when Appellant asked the Commission to remove the effect of the illegal charges on the level of the to-be-phased-in balance, the Commission held that the retroactive ratemaking barrier is in the way as a matter of law.

Because common sense, the record, and the law do not warrant the absurd result favored by the Companies and the Commission, Appellant respectfully urges the Court to reverse the Commission's authorization of the Pre-2009 Component. Irrespective of the Court's ruling regarding the Pre-2009 Component, Appellant requests that the Court direct the Commission to remove the effect of the illegal portion of the total increase from the to-be-phased-in portion of the total increase eligible for future collection.

Respectfully submitted,



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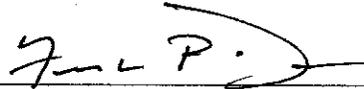
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Brief of Appellant, Industrial Energy Users-Ohio*, was served upon the parties of record this 9th day of July 2012 via electronic transmission, hand-delivery, or ordinary U.S. mail, postage prepaid.



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IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets	: Case No. 2012-0187 : : Appeal from the Public Utilities Commission of Ohio : : Public Utilities Commission of Ohio Case Nos. 08-917-EL-SSO and 08-918-EL-SSO
In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan	: : : :

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Columbus Southern Power Company and)
Ohio Power Company for Authority to) Case No. 11-346-EL-SSO
Establish a Standard Service Offer Pursuant) Case No. 11-348-EL-SSO
to Section 4928.143, Revised Code, in the)
Form of an Electric Security Plan.)

In the Matter of the Application of)
Columbus Southern Power Company and) Case No. 11-349-EL-AAM
Ohio Power Company for Approval of) Case No. 11-350-EL-AAM
Certain Accounting Authority.)

In the Matter of the Application of)
Columbus Southern Power Company and)
Ohio Power Company for Approval of) Case No. 11-4920-EL-RDR
Mechanisms to Recover Deferred Fuel) Case No. 11-4921-EL-RDR
Costs Ordered Under Section 4928.144,)
Revised Code.)

ENTRY ON REHEARING

- (1) On January 27, 2011, Columbus Southern Power Company and Ohio Power Company (jointly, AEP-Ohio)¹ filed an application for a standard service offer pursuant to Section 4928.141, Revised Code. The application was for an electric security plan in accordance with Section 4928.143, Revised Code.
- (2) On September 7, 2011, a Stipulation and Recommendation (Stipulation) was filed by AEP-Ohio, Staff, and other parties to resolve the issues raised in several cases pending before the Commission, including the above captioned cases.
- (3) On December 14, 2011, the Commission issued its Opinion and Order, adopting the Stipulation, with modifications.

¹ By entry issued on March 7, 2012, the Commission approved and confirmed the merger of Columbus Southern Power Company into OP, effective December 31, 2011. *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC.

- (4) On February 23, 2012, the Commission issued its Entry on Rehearing determining that the Stipulation, as a package, did not benefit ratepayers and the public interest and, thus, did not satisfy the three-part test for the consideration of stipulations. The Commission directed AEP-Ohio to file its proposed tariffs to continue the provisions, terms, and conditions of its previous electric security plan no later than February 28, 2012.
- (5) On February 28, 2012, AEP-Ohio submitted its proposed compliance tariffs containing the provisions, terms, and conditions of its previous electric security plan, as approved in *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 08-917-EL-SSO et al. (ESP I). The Industrial Energy Users-Ohio (IEU-Ohio), Ormet Primary Aluminum Corporation (Ormet), the Ohio Consumers Counsel and the Appalachian Peace and Justice Network (OCC/APJN), and FirstEnergy Solutions (FES) filed objections to various parts of AEP-Ohio's proposed compliance tariffs, including the implementation of the phase-in recovery rider (PIRR), which was contained within the proposed tariffs.
- (6) AEP-Ohio filed revised tariffs on March 6, 2012, that reinserted terms and conditions that were omitted from the proposed tariffs filed on February 28, 2012.
- (7) On March 7, 2012, the Commission issued an entry (March 7 Entry) approving the tariffs in part and ordered AEP-Ohio to file new tariffs removing the PIRR and deferring consideration of AEP-Ohio's application to establish the PIRR to *In re Columbus Southern Power Company*, Case No. 11-4920-EL-RDR and *In re Ohio Power Company*, Case No. 11-4921-EL-RDR (jointly *Deferred Fuel Cost Cases*).
- (8) On March 14, 2012, AEP-Ohio filed an application for rehearing of the March 7 Entry. AEP-Ohio asserts that the Commission's refusal to allow the PIRR to become immediately effective violates the Commission's decision in the *ESP I* order. AEP-Ohio opines that *ESP I* authorized the recovery of the fuel cost deferrals beginning in 2012 and continuing through 2018. AEP-Ohio contends that the Commission also violated Sections 4928.143(C)(2)(b) and 4928.144, Revised Code. AEP-Ohio

believes these provisions require the Commission to ensure the recovery of the fuel cost deferrals as set forth in the *ESP I* proceedings. In AEP-Ohio's last two assignments of error, the Companies argue that the March 7 Entry should have authorized the PIRR to continue to incorporate a weighted average cost of capital carrying charge. AEP-Ohio also asserts that the Commission erred by failing to order the PIRR be enabled to recover the deferred fuel expense on a gross-of-tax basis, consistent with the *ESP I* order.

- (9) On March 21, 2012, Ormet filed a memorandum contra AEP-Ohio's application for rehearing. In its memorandum, Ormet explains that the March 7 Entry is not inconsistent with the *ESP I* order, as the Commission did not approve any specific recovery mechanism but rather, created a general approval of the future recovery of deferred fuel costs. Ormet points out that, even if the *ESP I* order had created a cost recovery mechanism, there is no language requiring that specific mechanism be effective by a certain date.
- (10) On March 26, 2012, FES filed a memorandum contra AEP-Ohio's application for rehearing. In its memorandum, FES argues that the *ESP I* order authorized a collection of any deferrals, if necessary, thus indicating a separate proceeding or assessment would occur as to the collection of the deferrals. Further, FES points out that there is no language within the *ESP I* order permitting AEP-Ohio to automatically begin recovery in the beginning of 2012; thus, nothing precludes AEP-Ohio from recovering deferrals from the 2012 to 2018 time frame. FES also states that the Commission's March 7 Entry does not violate Sections 4928.143(C)(2)(b) and 4928.144, Revised Code, as nothing within the March 7 Entry precludes AEP-Ohio from collecting the deferrals authorized in *ESP I* order.
- (11) OCC/APJN filed a memorandum contra AEP-Ohio's application for rehearing on March 26, 2012. OCC/APJN claim that there is nothing within either the *ESP I* order or Ohio law that requires the PIRR to be immediately collected by a set date. OCC/APJN argue that the March 7 Entry explained that the issues surrounding the PIRR would be addressed in the *Deferred Fuel Cost Cases*. Further, OCC/APJN note that, as there is no Commission precedent or state law requiring the

Commission to permit AEP-Ohio to recover PIRR charges after rejecting the Stipulation, it was not necessary for the Commission to address the weighted average cost of capital for carrying charges or collection of the deferred fuel expenses on a gross-of-tax basis.

- (12) On March 26, 2012, IEU-Ohio filed a memorandum contra AEP-Ohio's application for rehearing of the March 7 Entry. IEU-Ohio explains that the Commission properly ordered AEP-Ohio to exclude the proposed PIRR rates, and nothing within Sections 4928.143(C)(2)(b) or 4928.144, Revised Code, requires the Commission to immediately implement the PIRR. IEU-Ohio opines that since the Commission did not permit the PIRR to be filed within the tariffs, the Commission did not need to address the amortization rate of the *ESP I* order deferrals.
- (13) The Commission finds that AEP-Ohio's application for rehearing of the March 7 Entry should be denied. While the March 7 Entry ordered AEP-Ohio to remove the PIRR from its proposed tariffs filed before the Commission, the March 7 Entry did not preclude AEP-Ohio from the recovery of fuel cost deferrals with carrying costs but rather, provided that the PIRR recovery will be addressed in the *Deferred Fuel Cost Cases*. While the Commission's order in the *ESP I* proceedings permits AEP-Ohio to seek recovery of fuel cost deferrals from 2012 to 2018, it did not establish a rider or other tariff provision for AEP-Ohio to recover deferred fuel costs or set a hard deadline for when recovery shall begin. To the contrary, as FES points out, in the *ESP I* order, the Commission explicitly provided that any recovery shall occur as necessary, indicating the Commission would conduct an additional analysis to determine the appropriate recovery of fuel cost expenses incurred plus carrying costs. AEP-Ohio's mischaracterization of both the language within the March 7 Entry and the *ESP I* order unravels its other assignments of error, as the Commission cannot violate Sections 4928.144 and 4928.143(C)(2)(b), Revised Code, when the March 7 Entry is entirely consistent with its order in the *ESP I* proceedings. Further, AEP-Ohio's arguments that the March 7 Entry failed to order the PIRR to incorporate a weighted average cost of capital carrying charge or permit AEP-Ohio to recover the deferred fuel expense on a gross-of-tax basis should be rejected, as both arguments are premature and will be addressed in the

Deferred Fuel Cost Cases, as established in the March 7 Entry. Accordingly, AEP-Ohio's application for rehearing of the March 7 Entry is denied.

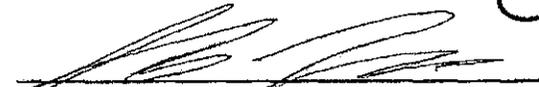
It is, therefore,

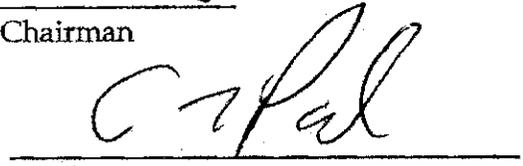
ORDERED, That AEP-Ohio's Application for Rehearing of the March 7 Entry be denied. It is, further,

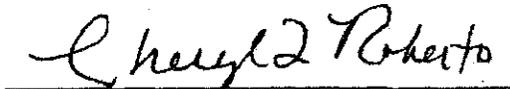
ORDRED, That a copy of this entry on rehearing be served on all parties of record.

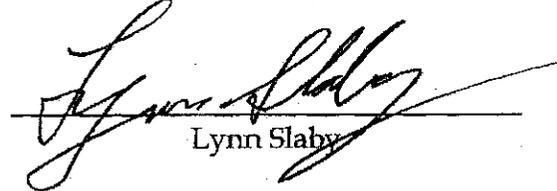
THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Steven D. Lesser


Andre T. Porter

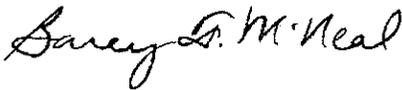

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Secretary